Office of Administrative Law JudgesWASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENTEMPLOYEES,
LOCAL 2419 Respondent

and JAMES J. POWERS Charging Party Case No. WA-CO-50021

Mark D. RothMichael J. Schrier Counsel for the Respondent Thomas F. Bianco Counsel for the General Counsel, FLRA Before: GARVIN LEE OLIVER Administrative Law Judge

DECISION

ON APPLICATION FOR ATTORNEY FEES

Statement of the Case

This proceeding is based upon an application for attorney fees filed under the Equal Access to Justice Act, 5 U.S.C. § 504, hereinafter referred to as the EAJA, and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), codified at 5 C.F.R. Part 2430.

The Authority issued its decision in the above-captioned case on December 17, 1997, in which it found that the Respondent, American Federation of Government Employees, Local 2419 (the Union), did not violate the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.* (the Statute), as alleged in the complaint and therefore dismissed the complaint in its entirety. *American Federation of Government Employees, Local 2419,* 53 FLRA 835 (1997) (*AFGE, Local 2419*).

Thereafter, on December 17, 1997, the Union filed an Application For Attorney Fees and a separate Petition For Rulemaking To Increase The Maximum Rate For Attorney Fees. By Order dated January 9, 1998, the Authority referred the Union's application for attorney fees to the Office of Administrative Law Judges for further processing in accordance with section 2430.7(a) of its Rules and Regulations, 5 C.F.R. § 2430.7(a), and placed the Union's petition for rulemaking in abeyance pending disposition of the application for attorney fees.

The General Counsel's Answer To Respondent's Application For Attorney Fees, requesting dismissal of the application, was received on January 28, 1998. The matter was assigned to the undersigned for disposition.

The Applicable Law and Regulations

The Union's application for attorney fees was filed under the Equal Access to Justice Act which provides, in part, as follows:

Sec. 504. Costs and fees of parties.

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative

officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances made an award unjust.

5 U.S.C. § 504(a)(1).

The Authority's implementation of the EAJA is found in Part 2430 of the Rules and Regulations. Section 2430.1 provides, in pertinent part:

§ 2430.1 Purpose.

An eligible party may receive an award when it prevails over the General Counsel, unless the General Counsel's position in the proceeding

was substantially justified, or special circumstances make an award unjust.

Section 2430.2 sets forth who is eligible to apply for an award, and the eligibility requirements are in accord with those specified in the EAJA. The standards for receiving an award are found in section 2430.3, which provides as follows:

§ 2430.3 Standards for awards.

(a) An eligible applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete portion of the proceeding, unless the position of the General Counsel over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may avoid an award by showing that its position in initiating the proceeding was reasonable in law and fact.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

The application and supporting documents establish, and the General Counsel does not dispute, that the Union meets the eligibility requirements under the EAJA and the Authority's implementing Rules and Regulations. Additionally, it is clear and undisputed that the Union was the prevailing party in the adversary unfair labor practice proceeding for which attorney fees are being sought. There is no contention that the Union unduly or unreasonably protracted the proceeding, or that special circumstances would make an attorney fee award unjust. Nor does the General Counsel challenge at this time the amount of attorney fees and expenses sought by the Union. Accordingly, the only issue to be decided is whether the General Counsel has met the burden of showing that its position in initiating the proceeding, or in a significant and discrete portion of the proceeding, was reasonable in law and fact.

As the Authority stated in *American Federation of Government Employees, Local 1857, AFL-CIO (Sacramento Air Logistics Center), North Highland, California*, 48 FLRA 900, 901 (1993):

In order to avoid the imposition of attorney's fees under the EAJA, the General Counsel has

the burden of proving that his position was "substantially justified." 5 U.S.C. § 504(a)(1). The U.S. Supreme Court has

stated that "substantially justified" means having a "reasonable basis both in law and fact[,]" or "justified to a degree that

could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

The "position" of the government includes the action on which the litigation is based, as well as the positions the government takes during the litigation. *Oregon Natural Resources Council v. Madigan*, 980 F.2d 1330, 1331 (9th Cir. 1992). The prevailing party may recover a partial award if the agency's position was not

substantially justified in only one portion of the proceedings. *Europlast Ltd. v. NLRB*, 33 F.3d 16, 17 (D.C. Cir. 1994) (citing *McDonald v. Washington*, 15 F.3d 1126, 1129-30 (D.C. Cir. 1994); *Leeward Auto Wreckers v. NLRB*, 841 F. 2d 1143 (D.C. Cir. 1988)(*Leeward Auto*).

The Portion of the Proceedings Relating To Issuance of the Complaint and the Hearing

The issues posed by the unfair labor complaint filed by the General Counsel were: (1) whether the Union violated section 7116(b)(1) of the Statute by expelling Mr. Powers from membership in the Union for exercising his rights under section 7102 of the Statute, and (3) whether the Union violated section 7116(c) and 7116(b)(8) of the Statute by expelling Mr. Powers from membership in the Union for reasons other than failure to meet reasonable occupational standards or to tender dues.

In bringing the complaint, the General Counsel relied upon, and presented at the hearing, the testimony of Mr. Powers. Powers testified, in effect, that all he did at a meeting on or about March 1, 1994 was to express his dissatisfaction with the Union and sign a survey reflecting that opinion. The General Counsel urged that Mr. Powers was engaged in protected activity and his expulsion from membership violated the Statute.

Based on the testimony of Mr. Powers, the General Counsel had a reasonable basis in fact for issuing the complaint and proceeding to a hearing. The credibility question was based upon an actual material conflict which the trier of fact was obligated to resolve in adjudicating the case. *Leeward Auto*. The General Counsel was entitled to assume that Powers' testimony would be credited. *American Federation of Government Employees, Local 495, AFL-CIO (Veterans Adminis-tration Medical Center, Tucson, Arizona)*, 22 FLRA 966, 970-71 (1986)(*AFGE Local 495*).

The General Counsel also had a reasonable basis in law for issuing the complaint and proceeding to a hearing. Had the testimony of Mr. Powers' been credited, the General Counsel would have established a violation of section 7116(b)(1). Section 7116(b)(1) of the Statute expressly prohibits a union from acting in a manner that interferes with, restrains or coerces an employee's exercise of rights

under the Statute. Among the rights conferred on employees by section 7102 is expressing criticism of their union without fear of penalty or reprisal. *American Federation of Government Employees, Local 3475, AFL-CIO*, 45 FLRA 537, 549-50 (1992); *Overseas Education Association*, 11 FLRA 377, 378 (1983).

The General Counsel also had a reasonable basis in

fact and law for issuing the complaint with respect to the alleged violation of section 7116(c) and 7116(b)(8). If Mr. Powers' testimony had been credited, he would have been engaged in protected activity and his discipline by the Union under section 7116(c) for such activity, and not for misconduct, would have been beyond the legitimate interests of the Union to regulate its own affairs, inconsistent with section 7102 of the Statute, and, therefore, a violation of the alleged provisions. *American Federation of Government Employees, AFL-CIO*, 29 FLRA 1359 (1987); *AFGE, Local 2419*, 53 FLRA at 841.

As the position of the General Counsel was substantially justified, the Union is not entitled to the claimed fees and expenses incurred during this portion of the proceedings.

Administrative Law Judge Decision

The Administrative Law Judge (the undersigned), contrary to the position of the General Counsel, credited the testimony of the Respondent's witness, Douglas Duane Welch, and found that Mr. Powers, then a Treasurer of AFGE, Local 2419, at an employee meeting on March 9, 1994, signed a paper which could reasonably be interpreted as a "No" vote on "keeping the union" and "was very vocal about the point that . . . it would be a

wise decision to get rid of 2419 and get somebody else." I concluded that Mr. Powers' conduct in this respect was not protected activity, and the Union disciplinary procedures to expel him did not violate section 7116(b)(1).

I also found that Mr. Powers was not denied membership in violation of section 7116(c), but was expelled from union membership for misconduct pursuant to the union's authority to enforce discipline, as clearly permitted by the last sentence of section 7116(c). *AFGE, Local 2419*, 53 FLRA at 849-57.

The Portion of the Proceedings Before the Authority

Following the decision of the Administrative Law Judge finding no violation of the Statute, the General Counsel filed exceptions to the Authority. The General Counsel did not contest the findings of the Administrative Law Judge with respect to the conduct of Mr. Powers, but asserted that the conduct, as found, was protected activity. The General Counsel took the positions (1) that Local 2419's disciplinary action under section 7116(c) violated section 7116(b)(1) by

retaliating against Powers for engaging in activity protected under section 7102, (2) that the Judge failed to take into account the chilling effect that Local 2419's actions against Powers may have had on other employees, and (3) that contrary to the Judge's conclusion, the expulsion from membership does "deny membership" to Powers on a basis not recognized in subsection (1) or (2) of section 7116(c). *AFGE, Local 2419*, 53 FLRA at 839-40.

The General Counsel's exception to the Authority, raising the issue that the expulsion from membership does "deny membership" to Powers on a basis not recognized in subsection (1) or (2) of section 7116(c), did not have a reasonable basis in law. As the Authority explained in detail, "Such a construction is at odds with the wording of section 7116(c) and with Authority precedent." *AFGE, Local 2419*, 53 FLRA at 842-43.

The General Counsel's exceptions raising issues regarding the chilling effect that Local 2419's actions against Powers may have had on other employees, and that the disciplinary action under section 7116(c) violated section 7116(b)(1) by retaliating against Powers for engaging in activity protected under section 7102, prompted the Authority "to review how the Statute deals with an employee's right to engage in protected activity vis-a-vis a union's right to enforce discipline against its members." After examining this question, the Authority found that "the Authority, NLRB, and judicial precedent, interpreting an employee's right to engage in protected activity and a union's right to discipline, is harmonious and consistent." The Authority observed that "[h]aving examined the arguments raised by the parties in this case, we see no reason to deviate from established precedent interpreting these provisions of the Statute." The Authority concluded that Local 2419's discipline did not violate the Statute; that Powers' actions went beyond mere criticism and threatened Local 2419's existence as an institution; and that "we find no inconsistency between the Judge's determination in this case and prior Authority precedent." *AFGE, Local 2419*, 53 FLRA at 843-47.

Since the General Counsel's exceptions to the Authority were not supported by the wording of section 7116(c) or Authority precedent, I conclude that the General Counsel's exceptions to the Authority did not have a reasonable basis in law and fact and, therefore, the General Counsel's position was not substantially justified in that significant and discrete portion of the proceedings. Therefore, the application for attorney fees will lie for work before the Authority and on the attorney fee application in that period following the decision of the Administrative Law Judge. *See Leeward Auto Wreckers v. NLRB*, 841 F.2d 1143 (D.C. Cir. 1988)

(Attorney fees appropriate for period beginning after the close of the evidence and conclusion of the hearing before the Administrative Law Judge.).

Allowable Fees and Expenses

Attorney Schrier's affidavit, on behalf of Respondent's AFGE Legal Representation Fund, reflects that he expended 17.50 hours of work on the case in the period from October 23, 1995 (issuance of the Administrative Law Judge decision) to December 17, 1997 (application for attorney fees following Authority decision on November 17, 1997). With respect to a jurisdictional issue, Mr. Schrier, in his brief to the Authority, incorporated by reference his brief on this issue to the Administrative Law Judge. Thus, there was no duplication with respect to this single issue on which the Respondent did not prevail.

In the absence of a specific showing to the contrary, I conclude from Mr. Schrier's affidavit and explanation of the dates, time, and nature of the work performed that the hours claimed by counsel were reasonably expended and the request for $158.46 in expenses is also appropriate.

Under the EAJA, the Union may recover market rate for fees up to the statutory limit. *American Federation of Government Employees, Local 2391, AFL-CIO*, 44 FLRA 1084 (1992). The statutory limit, as applicable here, is $75 per hour.(1)

Mr. Schrier's affidavit demonstrates that the prevailing rate for similar services in the community in which he ordinarily performs services, the District of Columbia, meets and exceeds this statutory limit. The Union is, therefore, entitled to this statutory limit, recognizing that Respondent's petition for rulemaking under the EAJA and section 2430.5 of the Authority's Regulations, to increase the amount of fees applicable to this and future cases, has been held in abeyance by the Authority pending the disposition of this application.

In determining the amount of fees to award, the number of hours "reasonably expended" on the litigation is multiplied by a "reasonable hourly rate." *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). 17.50 hours multiplied by $75 is $l337.49.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order, as amended by any applicable action in the rulemaking proceeding:

ORDER

As provided in 5 C.F.R. § 2430.14, the Authority grants an award to the AFGE Legal Representation Fund in the amount of $1337.49 in attorney fees and $158.46 in expenses. To obtain payment, the Union must follow the procedures set forth in 5 C.F.R. § 2430.14.

Issued, Washington, DC, February 17, 1998

GARVIN LEE OLIVER

Administrative Law Judge

Dated: February 17, 1998

Washington, DC

1. The 1996 amendment to the EAJA increased the statutory limit from $75 to $125, but is applicable only to adjudications commenced on or after the date of the enactment (Mar. 29, 1996). Pub. L. 104-121, §§ 231(b)(1), 233 (1996).